RECORD AND BRIEFS

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No. 16–1495

In the Supreme Court of the United States

CITY OF HAYS, KANSAS, PETITIONER

v.

MATTHEW JACK DWIGHT VOGT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

A. The Split Is Real

Although the district court ruled for petitioner and the court of appeals for respondent, both courts below agreed on one thing: "The Circuits * * * are split on this issue." Pet. App. 41a (district court); accord *id.* at 6a (court of appeals) (noting "a circuit split * * * over the definition of a 'criminal case' under the Fifth Amendment."). Before the Tenth Circuit, respondent himself acknowledged that this case "addresses an important matter of Constitutional interpretation *in which there is a split amongst the Federal Circuits.*" Resp. C.A. Br. 33 (emphasis added). Now that the case is before this Court, however, respondent insists that the court below simply "followed the consensus view" and that "there is no contrary line of circuit authority." BIO 1–2. Respondent was right the first time.

1. The split between the court below and *Renda* v. *King*, 347 F.3d 550 (3d Cir. 2003), is far more than "arguabl[e]." BIO 12. Just like respondent, "Renda's statement was used in a criminal case in one sense (*i.e.*, to develop probable cause sufficient to charge her)," 347 F.3d at 559, but the charges were dismissed after pretrial proceedings and without a trial, see *id.* at 553. The *ratio decidendi* of *Renda* was likewise directly contrary to that of the Tenth Circuit in this case: "[I]t is the use of coerced statements during a criminal trial, *and not in obtaining an indictment*," *Renda* holds, "that violates the Constitution." *Id.* at 559 (emphasis added). That rule is now well–settled in the Third Circuit

and district courts have relied on it in dismissing claims materially identical to those of respondent.[1]

Respondent offers no plausible basis for distinguishing *Renda*. True, the main precedent on which *Renda* drew was a case about the scope of the qualified immunity defense rather the meaning of the Fifth Amendment. See BIO 13. But *Renda* wasn't. Instead, the question in *Renda*, as here, was whether the defendant's conduct "violate[d] the Constitution." *Renda*, 347 F.3d at 559.

Respondent also is correct (see BIO 13) that the type of the alleged Self–Incrimination Clause violation in this case is different from *Renda* because *Renda* involved a *Miranda* claim whereas this case involves an alleged violation of the rule of *Garrity* v. *New Jersey*, 385 U.S. 493 (1967). See Pet. 2 & n.1 (describing underlying claim). Respondent provides no explanation for why the *type* of allegedly coercive conduct would possibly bear on the *timing* question at issue here. And perhaps the best evidence for why the type of underlying Fifth Amendment claim doesn't matter is the fact that, in describing the decisions he characterizes as representing "the con-

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[1] See *Brooks* v. *Luther*, Civ. Act. No. 15–6707 (JBS–KMW), 2017 WL 626711, at *3 (D.N.J., Feb. 15, 2017) ("Plaintiff states the alleged coerced confession was used to secure an indictment and was referenced at his pretrial hearing. * * * He does not allege it was used against him at trial. Therefore, he has failed to state a claim, and the Court shall dismiss this claim without prejudice."); *Ojo* v. *Luong*, Civ. Act. No. 14–4347 (JLL), 2016 WL 1337274, at *5 (D.N.J., Apr. 5, 2016) (dismissing claim where plaintiff alleged "that his statements were used against him as part of pre–trial proceedings in his criminal case"); accord *Burno* v. *Kolich*, Civ. No. 07–4863 (FSH), 2008 WL 323614, at *4 (D.N.J., Feb. 4, 2008) (relying in *Renda* to dismiss claim where the plaintiff challenged use of allegedly compelled statements for purposes of "a pretrial ruling * * * denying a motion to suppress").

sensus view" (BIO 1), respondent moves seamlessly between decisions involving different types of Fifth Amendment claims. See BIO 8–10 (discussing, in turn, *Sornberger* v. *City of Knoxville*, 434 F.3d 1006, 1023 (7th Cir. 2006) (coerced confession claim and *Miranda* claim); *Best* v. *City of Portland*, 554 F.3d 698, 702 (7th Cir. 2009) (*Miranda* claim); *Higazy* v. *Templeton*, 505 F.3d 161, 170–171 (2d Cir. 2007) (coerced confession claim); *Stoot* v. *City of Everett*, 582 F.3d 910, 922 (9th Cir. 2009) (coerced confession claim), cert. denied, 559 U.S. 1057 (2010)).

2. Respondent's answer to all of the other decisions we have cited is to dismiss their statements as non–binding and unconsidered dicta. The courts below disagreed, of course. See Pet. App. 6a ("The Third, Fourth, and Fifth Circuits have stated that the Fifth Amendment is only a trial right."); *id.* at 42a ("The Fourth, Fifth, and Sixth Circuits also hold that the Fifth Amendment is not violated until a compelled statement is introduced at trial."). So does the next–most–recent decision that respondent presents as embodying "the consensus view." BIO 1; see *Stoot*, 582 F.3d at 924 (stating that "[t]he Third, Fourth, and Fifth Circuits have applied *Chavez* [v. *Martinez*, 538 U.S. 760 (2003)] to bar recovery under the Fifth Amendment unless the allegedly coerced statements were admitted against the defendant *at trial*"). So do district courts. See *Dowell* v. *Lincoln County*, 927 F. Supp.2d 741, 749 (E.D. Mo. 2013) (stating that "[t]hree circuits have held that statements must actually be used at trial" and citing decisions from the Third, Fourth, and Fifth Circuits); *Tinney* v. *Richland County*, No. 1:14 CV 703, 2015 WL 542415, at *4 (N.D. Ohio, Feb. 10, 2015) (stating that that "[t]he Third, Fourth, and Fifth Circuits appear to be in accord" that "when the government does not try to admit the confession

at a criminal trial, the Fifth Amendment plays no role") (citation omitted)). This split will not go away on its own and the lower courts are in need of this Court's guidance.

B. The Tenth Circuit's Decision Is Wrong

1. Respondent answers at length an argument we do not make while ignoring one we do make. Our argument does not turn on when a "criminal case" begins. U.S. Const. amend. V. Rather, it depends on what uses of allegedly compelled statements do—and what uses do not—render a someone "a witness against himself." *Ibid.* Our position is simple: "Mere compulsion" does not violate the Self–Incrimination Clause. *Chavez*, 538 U.S. at 773 (opinion of Thomas, J.). Until a criminal defendant is compelled to take the witness stand or the defendant's compelled out–of–court statements are presented to the jury, we submit, the defendant has not been made "to be a witness against himself" for purposes of that Clause.

2. Respondent's discussion of grand juries (see BIO 17–19) likewise misses the mark. It is common ground that "certain constitutional protections afforded defendants in criminal proceedings have no application before" a grand jury. *United States* v. *Williams*, 504 U.S. 36, 49 (1992). The question is why. Other that "just because," respondent offers no answer. But we do: Because the introduction of allegedly compelled statements before a grand jury does not render the declarant a person "a witness against himself" for purposes of the Fifth Amendment.

This point is confirmed, not undermined, by the fact that those "called upon to testify before the grand jury may invoke their Fifth Amendment

rights against self–incrimination, and may obtain use immunity encompassing their testimony." BIO 18–19. The reason a person called before a grand jury may invoke his own right to remain silent is the same as why that same person could do so in a police interrogation room or if called to testify in a civil case: the risk that those statements could *later* be used against him in a criminal trial. That, too, is why a grant of use immunity works: by eliminating any possibility that the compelled statements be used in the only setting where a Self–Incrimination Clause violation can occur, a criminal trial.

C. There Are No Vehicle Problems

The court of appeals' remand for further proceedings (BIO 19), the existence of other potential defenses (BIO 18–21), and the unremarkable fact that this case may raise other issues as well (BIO 22) provide no reason for denying certiorari on the single issue of law that is squarely presented here.

1. This case began with six defendants: two municipalities and four individual officers. See Pet. 3. After 27 months of litigation, the only remaining defendant is petitioner, a municipality whose population is just over 20,000 people. See Resp. C.A. App. 6 (giving filing date as May 14, 2015). Although petitioner, unlike its individual officers, has no ability to raise a qualified immunity defense, it has similar interests in not being subject to burdensome litigation for any longer than necessary.[2] This Court has not hesitated to grant municipalities' petitions for writs of certiorari in cases in this exact procedural posture: Section 1983 actions where a court of appeals reversed a district court's grant of a

[2] The district court has stayed proceedings pending the disposition of this petition for a writ of certiorari.

municipal defendant's motion to dismiss for failure to state a claim. See *Town of Castle Rock* v. *Gonzales*, 545 U.S. 748, 754–755 (2005); *Inyo County* v. *Paiute–Shoshone Indians of the Bishop Comm. of the Bishop Colony*, 538 U.S. 701, 706–708 (2003); *Town of Newton* v. *Rumery*, 480 U.S. 386, 391 (1987); *Polk County* v. *Dodson*, 454 U.S. 312, 315–316 (1981); see also *Cook County* v. *United States ex rel. Chandler*, 538 U.S. 119, 124–125 (2003) (court of appeals had reversed grant of motion to dismiss in favor of municipality in a False Claims Act action); *Board of County Com'rs* v. *Umbehr*, 518 U.S. 668, 672 (1996) (court of appeals had reversed grant of summary judgment in favor of municipality in Section 1983 case).

2. Unless promptly corrected, the court of appeals' erroneous decision will have adverse impacts far beyond one city in Kansas. Future panels of the Tenth Circuit and district courts throughout that circuit will be bound by the court of appeals' Fifth Amendment holding. And because that decision will itself create "clearly established law" within the Tenth Circuit, individual officers will be required to follow it on pain of losing the qualified immunity defense that shielded the individual defendants in this case. Pet. App. 21a–24a; see also Pet. 13–14 (explaining why the problem for officers "is only compounded by the fact that Self–Incrimination Clause analysis often depends on factors such as age, education, prior criminal experience, the manner of interrogation, and the existence of threats or inducement").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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